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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FELINO V. BERDAN, JR. et al.,
Plaintiffs and Appellants,

v.

FIRMAC, INC.,
Defendant and Respondent.

A140339

(Contra Costa County
Super. Ct. No. MSC12-02889)

Plaintiffs Felino V. Berdan, Jr. and Belinda Adel-Berdan (the Berdans) appeal from an order denying their motion to vacate a judgment entered in favor of defendant Firmac, Inc. (Firmac) and issued by the Contra Costa County Superior Court. We conclude we do not have jurisdiction to consider any but one of the Berdans' arguments because they relate to rulings from which the Berdans have not appealed, and that the one properly presented argument lacks merit. Accordingly, we dismiss their appeal in part and otherwise affirm the court's order.

I.

BACKGROUND

In December 2012, the Berdans filed a complaint against several defendants, including Deutsche Bank National Trust Co., GMAC Mortgage, LLC, ETC Services, LLC (Bank Defendants) and Firmac.¹ They alleged, among other things, that Firmac

¹ The Berdans refer to documents that are not in the record of this appeal, including their complaint, but which are in the record of their other appeal, *Berdan et al. v. Deutsche Bank N.T. et al.*, case number A138946 (A138946). They request that we

committed fraud (both affirmative and negative) and violated the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

According to the Berdans, Firmac acted improperly as their real estate broker in arranging the refinance of their home in San Ramon, California in 2005. The Berdans obtained two loans, the first for \$1,225,000 and the second for \$350,000, based on an appraisal arranged by Firmac that over-valued their property as part of a “pervasive industry-wide fraud.”

The Berdans also alleged that “[t]he collapse of the real estate values in California was not known to the public, nor to the plaintiffs until late 2009,” and that the subject deed of trust “contains a waiver of any statute of limitations defense.” At the same time, they alleged that “[t]he average national home value appreciation . . . collaps[ed] in or about 2007, largely due to unconscionable interest rate increases, making monthly payments unaffordable leading to an overwhelming number of defaults.”

The Berdans further alleged that after they were unable to make all of the required monthly payments, they entered into loan modification discussions, during which they realized they had been misled regarding “the fa[c]ts of home values and loan terms and inflationary expectations.” Their home was subsequently sold at an improper trustee sale. They sought equitable relief and monetary damages.

The Bank Defendants demurred to the Berdans’ complaint, to which the Berdans did not file any written opposition. The trial court sustained these demurrers by order filed on March 26, 2013, and entered judgment that same day, notice of which was served by the Bank Defendants on April 5, 2013.

Firmac answered the complaint and filed a motion for judgment on the pleadings. Firmac contended, among other things, that the Berdans’ causes of action against it were barred by the applicable statutes of limitations. It asked the court to take judicial notice of certain materials indicating that, “[b]y, at the latest, November 2008, the United States

take judicial notice of that record. Firmac objects. We grant the Berdans’ request in order to explain events pertinent to this appeal. (Evid. Code, §§ 452, subd. (d), 453.)

entered into a widely reported, financial crisis centering on problems in the housing market, including decreasing prices and inability of borrowers to refinance.”²

The Berdans filed a “Declaration of Plaintiffs’ Intent to File a First Amended Complaint.” They did not file an opposition to Firmac’s motion. Firmac filed a reply, in which it contended that the Berdans’ notice of intent was not an opposition and that the Berdans had not moved for leave to amend, nor filed, a first amended complaint. The court then rejected the Berdans’ attempt to file without leave of court their proposed first amended complaint.

Soon thereafter, the trial court issued a tentative ruling granting Firmac’s motion. The Berdans did not oppose this tentative ruling. On June 7, 2013, the trial court adopted its tentative ruling and granted Firmac’s motion in the absence of any “meaningful opposition.” On August 20, 2013, judgment was entered in Firmac’s favor.

The Berdans did not appeal from this judgment.³ On August 14, 2013, they filed a motion to vacate the judgment on multiple grounds, including pursuant to Code of Civil Procedure section 473, subdivision (b) based on the mistake or excusable neglect by their attorney, Thomas W. Gillen. The Berdans’ motion was accompanied by a dated, unsigned declaration in Gillen’s name contending that Gillen had not filed an opposition to Firmac’s motion for judgment on the pleadings because he realized a first amended complaint was necessary to correct certain errors and he “completely forgot” that Firmac had filed an answer to the Berdans’ complaint. Firmac opposed the motion, in part because such conduct was not “excusable.”

² The record on appeal does not contain any trial court ruling on this request for judicial notice. Firmac does not request that we take judicial notice of these materials.

³ On June 14, 2013, the Berdans filed a notice of appeal for case number A138496. In this notice, the Berdans stated they were appealing a court order or judgment dated June 7, 2013, pursuant to Code of Civil Procedure section 904, subdivisions (a)(3) through (13). The only order or judgment issued by the court on that date contained in the record is an order granting Firmac’s motion for judgment on the pleadings. By order dated May 22, 2015, we have dismissed that appeal, in part because the order appealed from was an interlocutory order.

The trial court stated its intention to deny the Berdans' motion to vacate the judgment in a tentative ruling that was not opposed. The court then adopted this ruling by order filed on October 16, 2013. The court stated in relevant part:

“To the extent [the Berdans] are seeking mandatory relief pursuant to [Code of Civil Procedure section] 473[, subdivision] (b), based on an attorney affidavit of fault, such relief is not available here. ‘By its express terms, the mandatory relief provision applies only to defaults, default judgments, and dismissals.’ *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1414-15.

“Plaintiffs’ request for relief also fails to the extent they are seeking discretionary relief under [Code of Civil Procedure section] 473[, subdivision] (b). A party who seeks relief under [section] 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable. In determining whether the attorney’s mistake or inadvertence was excusable, the court inquires whether ‘a reasonably prudent person under the same or similar circumstances’ might have made the same error. Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.

“In this instance, attorney Gillen’s mistake or neglect was not excusable, because a reasonable attorney would have checked to see whether an answer had been filed before attempting to file an amended pleading with the court.”

On October 31, 2013, the Berdans filed a notice of appeal from a judgment or order dated October 16, 2013, which it described as an order or judgment under Code of Civil Procedure section 904.1, subdivision (a)(3) through (13).

During the pendency of this appeal, the Berdans moved to consolidate this appeal with case number A138946. We denied this request. Firmac also moved for an award of fees on the grounds that the Berdans’ attorney Gillen, failed to serve certain documents to Firmac, failed to cite an on-point decision disposing of the case on its merits, and failed to properly cite to the record on appeal. We deny this motion. The Berdans requested

oral argument. However, their counsel did not appear at the designated time for argument, nor did counsel provide an explanation for this absence.

II.

DISCUSSION

The Berdans argue that the trial court should not have granted Firmac’s motion for judgment on the pleadings, nor denied their motion to vacate the judgment.⁴ We disagree.

A. *We Lack Jurisdiction to Consider Most of the Berdans’ Arguments.*

We first consider our jurisdiction to consider the Berdans’ arguments. “[T]he time for filing a notice of appeal is absolutely jurisdictional, and cannot be extended by a trial or appellate court without statutory authorization, even for reasons of mistake, estoppel, or other equitable considerations.” (*In re Marriage of Eben-King and King* (2000) 80 Cal.App.4th 92, 116.) “Failure to file a notice of appeal within the required time period therefore mandates dismissal of the appeal.” (*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 118 Cal.App.4th 1031, 1035.)

“The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.” (Cal. Rules of Court, rule 8.100(a)(2).) However, “[w]hile a notice of appeal must be liberally construed, it is the notice of appeal which defines the scope of the appeal by identifying the particular judgment or order being appealed. [Citations.] Care must be taken in drafting the notice

⁴ The Berdans also refer to a demurrer ruling and “respondents” in their briefs. Although it is not entirely clear what they are referring to (they refer at one point to a demurrer ruling by the Orange County Superior Court), this at least suggests they are also raising appellate arguments regarding the trial court’s sustaining of the Bank Defendants’ demurrers, although this is also the subject matter of their appeal in case number A138946. We of course have no jurisdiction to consider such arguments in this appeal. The Berdans’ October 31, 2013 notice of appeal is from an order granting the motion made by Firmac alone. No matter how liberally one construes this notice, it cannot be said to be from any of the court’s rulings or judgments regarding the Bank Defendants.

of appeal to identify the order or judgment being appealed so as not to mislead or prejudice respondent.” (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967.) Furthermore, “ “[w]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.” ” ” (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1316; accord, *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.)

We conclude that, as Firmac argues, we do not have jurisdiction to consider the Berdans’ arguments regarding the trial court’s August 20, 2013 judgment in Firmac’s favor, entered after the court granted Firmac’s motion for judgment on the pleadings. A motion to vacate a judgment may extend the time to appeal from a judgment under certain circumstances. (Cal. Rules of Court, rule 8.108(c).) However, such a motion is appealed from as a separate postjudgment order. (See *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1575.) “ ‘If the prior judgment or order was appealable, and the grounds on which vacation is sought existed before the entry of judgment, the correctness of the judgment should be reviewed on an appeal from the judgment itself.’ ” (*Id.* at p. 1576.) Thus, that a party may appeal, and does appeal, from such a motion does not excuse that party from separately appealing from—or at least identifying in its notice of appeal—the judgment itself.

The Berdans have not done so. They also have not actually argued in their reply to Firmac’s brief that we should liberally construe their October 31, 2013 notice of appeal as being from the judgment itself. We do not because no matter how liberally we construe the Berdans’ October 31, 2013 notice, nothing in it indicates they were appealing from the Firmac judgment. The notice refers specifically to one order, entered by the court on October 16, 2013. The only order of that date denied the Berdans’ motion to vacate the judgment. Nothing in the notice suggests in any way that the Berdans intended to appeal from the judgment. The notice contains no reference, direct or indirect, to the date or subject matter of the judgment, or the rules pursuant to which one may appeal from such a judgment.

Even if we were to consider the Berdans' arguments regarding the judgment (or, more specifically, the order granting Firmac's motion for judgment on the pleadings, which led to the judgment), we would be very unlikely to find them persuasive. As Firmac argues, the Berdans' complaint was not filed until December 2012, beyond the three- and four-year time periods provided for suits based on fraud or a violation of the unfair competition law respectively. (Code Civ. Proc, § 338, subd. (d); Bus. & Prof. Code, § 17208.)

Firmac also argues the Berdans should have discovered any purported fraud long before they filed suit. As Firmac points out, under the discovery rule for fraud (the gravamen of the Berdans' three causes of action against Firmac), a plaintiff must not only plead and prove lack of knowledge, but also establish that he or she lacked the “ ‘means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date).’ ” (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1525.) While the Berdans alleged in their complaint that they did not become aware of the fraud until late 2009, they also alleged that “[t]he average national home value appreciation . . . collaps[ed] in or about 2007, largely due to unconscionable interest rate increases, making monthly payments unaffordable leading to an overwhelming number of defaults.” Firmac argues this 2007 activity put the Berdans on notice of any alleged wrongdoing by Firmac and, therefore, started their time to file suit, making their claims time-barred.

We think this argument is likely to prevail on the merits. Indeed, the Berdans do not contest it. Instead, they argue only that they should have been given an opportunity to amend their complaint in order to allege a breach of fiduciary duty claim. However, the Berdans do not argue that such a claim would survive a statute of limitations challenge. We do not think it would. Generally, “[t]he statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent.” (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479.) Thus, the Berdans do not meet their burden of

showing that there is “a reasonable possibility” that they could cure their time defects by amendment. (See *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95-96.)

B. *The Trial Court Did Not Err in Denying the Motion to Vacate the Judgment.*

We are left, then, to consider the merits of the Berdans’ argument that the trial court was required to grant their motion to vacate the judgment entered in Firmac’s favor pursuant to the mandatory provision contained in Code of Civil Procedure section 473, subdivision (b).⁵ This argument is unpersuasive for two reasons.

Code of Civil Procedure section 473, subdivision (b) provides in relevant part that “the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.”

As Firmac points out, such relief is not available for a party who fails to oppose a motion simply because of an attorney’s incorrect analysis of the circumstances of the case. (See *Huh v. Wang* (2007) 158 Cal.App.4th, 1406, 1416-1417 [no relief for failure to oppose summary judgment].) The Berdans provide no legal authority or other explanation why the trial court erred in denying their motion, given the neglect alleged by the Berdans.

We note a second reason to reject the Berdans’ argument, one that is not raised by Firmac. The provision we quote above requires that any such motion made pursuant to Code of Civil Procedure section 473, subdivision (b) be accompanied by an attorney’s sworn affidavit. The record on appeal indicates the Berdans did not accompany their

⁵ The Berdans do not challenge the trial court’s ruling regarding the discretionary prong of section 473, subdivision (b). Therefore, we do not discuss this portion of the court’s ruling further.

motion with such an affidavit. It contains only an *unsigned* declaration in their attorney's name. Therefore, they were not entitled to any relief under this provision.

III.

DISPOSITION

We dismiss a portion of the Berdans' appeal as discussed herein and otherwise affirm the order appealed from. Firmac is awarded costs on appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.